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In the Supreme Court of the United States

OCTOBER TERM, 1988

RONALD W. SAPPENFIELD, ET AL., PETITIONERS

v.

STATE OF INDIANA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Indiana Racketeer Influenced and Corrupt Organizations Act, Ind. Code §§ 35-45-6-1 *et seq.*, may constitutionally incorporate state obscenity crimes as predicate acts.

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INTEREST OF THE UNITED STATES

This case presents the question whether the Indiana RICO statute, Ind. Code §§ 35-45-6-1 *et seq.*, may constitutionally incorporate state obscenity crimes as predicate acts. The substantive provisions of the Indiana RICO statute are patterned after the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. (& Supp. IV) 1961-1968 (federal RICO statute). See *4447 Corp.* v. *Goldsmith*, 504 N.E.2d 559, 564 (Ind. 1987), cert. granted *sub nom. Fort Wayne Books, Inc.* v. *Indiana*, No. 87-470 (Mar. 7, 1988). The federal RICO statute also incorporates certain obscenity crimes as predicate acts, to wit: (1) "any act or threat * * * dealing in obscene matter * * * which is chargeable under State law and punishable by imprisonment for more than one year;" and (2) "any act which is indictable under * * * sections [18 U.S.C.] 1461-1465 (relating to obscene matter)." 18

U.S.C. (& Supp. IV) 1961(1). The outcome of this case may therefore determine the constitutionality of using obscenity crimes as predicate acts in the federal RICO statute.

STATEMENT

1. The Indiana RICO statute prohibits a person "[w]ho is employed by or associated with an enterprise" from "knowingly or intentionally conduct[ing] or otherwise participat[ing] in the activities of that enterprise through a pattern of racketeering activity * * *." Ind. Code § 35-45-6-2(3). The phrase "pattern of racketeering activity" is defined in the statute to mean engaging in at least two related "incidents of racketeering activity." To engage in an incident of "racketeering activity" means "to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation" of one of a number of enumerated state criminal statutes, including "a violation of IC 35-49-3." *Id.* § 35-45-6-1. Section 35-49-3-1 makes it unlawful, inter alia, to distribute obscene matter.[1]

The distribution of obscene material in violation of Section 35-49-3-1 is a Class A misdemeanor, punishable by a term of imprisonment of not more than one year and a fine of not more than $5,000. Ind. Code §§ 35-49-3-1, 35-50-3-2.[2] A person convicted of an Indiana RICO viola-

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[1] Section 35-49-3 also prohibits certain activities relating to obscene performances (Ind. Code § 35-49-3-2) and the distribution of obscene material to minors (*id.* § 35-49-3-3).

[2] If the material in question "depicts or describes sexual conduct involving any person who is or appears to be under sixteen [16] years of age" (Ind. Code § 35-49-3-2), the offense is a Class D felony punishable by a term of imprisonment for between one and four years and a fine of not more than $10,000 (*id.* § 35-50-2-7).

tion is guilty of corrupt business influence, a Class C felony punishable by two to eight years' imprisonment and a fine of not more than $10,000. *Id.* §§ 35-45-6-2, 35-50-2-6. Indiana also has separate civil forfeiture provisions permitting the prosecuting attorney in a county in which the property is located to bring an action for the forfeiture of any property "used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of" the Indiana RICO statute. *Id.* § 34-4-30.5-3(a). A prior criminal prosecution is not a prerequisite to a civil forfeiture proceeding, but if there has been such a prosecution, "the principle of collateral estoppel operates to bar relitigation of the issues previously determined in [the] criminal proceeding" (*id.* § 34-4-30.5-6).[3]

2. As part of an investigation of adult bookstores in Howard County, Indiana, officers of the local sheriff's department bought several magazines at each of two stores allegedly owned and operated by petitioner Ronald Sappenfield and his former wife (J.A. 176-177). The magazines contained photographs depicting heterosexual and homosexual activity (J.A. 138-149, 177). Sappenfield was subsequently charged with six counts of distributing obscene matter, in violation of Ind. Code § 35-49-3-1, and with two counts of corrupt business influence, in violation of the Indiana RICO statute (J.A. 138-149).[4] Petitioners

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[3] Upon filing a civil forfeiture action, the prosecutor "may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of [the Indiana RICO statute] involving the property in question has occurred." Ind. Code § 34-4-30.5-3(b). The constitutionality of such a pretrial seizure, in the context of an obscenity case, is at issue in *Fort Wayne Books, Inc.* v. *Indiana, supra.*

[4] Sappenfield's former wife was charged with the same offenses, but the State later moved to dismiss the charges against her (see J.A. 136).

Fantasy One, Inc., and Fantasy Two, Inc. were each charged with three counts of distributing obscene matter and one count of corrupt business influence (*ibid.*).

Petitioners have not yet been tried on either the obscenity counts or the Indiana RICO counts (J.A. 177). Indiana has not seized any books, magazines, or other materials from petitioners, and no forfeiture actions have been brought against them.

3. Petitioners moved to dismiss the two RICO counts on numerous grounds (J.A. 150-167). The trial court granted the motion, holding that the Indiana RICO statute, as applied to obscenity predicates, is "unconstitutionally vague and violates the due process clause of the Fourteenth Amendment to the Constitution of the United States" (J.A. 175). The court reasoned that because the First Amendment creates a "presumption" that "printed matters, movies and publications * * * are legitimate," there must be "a judicial determination, in an adversary proceeding" that the materials in question are obscene before a seller of such materials can be prosecuted under the Indiana RICO statute (J.A. 174). The court concluded that the phrase "two incidents of racketeering activity" was unconstitutionally vague because it could mean "merely distributing or selling written material which has not been determined by a judicial proceeding to be unlawful" (*ibid.*).

4. The Court of Appeals of Indiana reversed the order of dismissal and reinstated the charges (J.A. 176-181). The court noted that the Supreme Court of Indiana in *4447 Corp.* v. *Goldsmith, supra,* had already concluded that because " '[o]bscenity does not come within the area of constitutionally protected speech or press * * * the overall purpose of the RICO statute is as applicable to obscenity violations as it is to the other enumerated

predicate offenses which have no conceivable First Amendment ramifications.'" J.A. 180 (quoting 504 N.E.2d at 564). The court of appeals also noted (J.A. 180) that the Supreme Court of Indiana had expressly concluded in that case (504 N.E.2d at 566) that prior convictions for predicate obscenity offenses are not required in order to prove a pattern of racketeering activity under the Indiana RICO statute. In light of that decision, the court concluded (J.A. 180), "Indiana's RICO statute is not unconstitutional as applied to the State's obscenity statute." The Supreme Court of Indiana denied review (J.A. 183).

SUMMARY OF ARGUMENT

The initial premise of each of petitioners' arguments is that the Indiana RICO statute must be subjected to heightened First Amendment scrutiny insofar as it incorporates state obscenity crimes as predicate acts. That premise is wrong. This Court has long recognized that obscenity is not protected under the First Amendment. *Roth* v. *United States,* 354 U.S. 476, 485 (1957). Provided that the predicate obscenity statute itself passes constitutional muster, the incorporation of obscenity offenses in the Indiana RICO statute does not raise any additional First Amendment concerns. States are free to enact obscenity laws and to impose criminal penalties for violations of those laws. The Indiana RICO statute affects only the penalty attached to the crime, not the type of expression proscribed, and, within Eighth Amendment limitations, it is up to the legislature to determine the appropriate penalty for a criminal offense.

In *Miller* v. *California,* 413 U.S. 15, 27 (1973), this Court developed a strict test for obscenity in order to "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." As long

as Indiana's obscenity statute defines obscenity according to the *Miller* criteria, the statute is neither vague nor overbroad. The prohibition against obscenity does not become vague or overbroad simply by being incorporated as a predicate act in another criminal statute. To obtain a conviction under the Indiana RICO statute, the government must prove beyond a reasonable doubt each essential element of the state obscenity law. It follows that the "potential reach" (Pet. Br. 28) of the Indiana RICO statute cannot extend beyond the reach of the underlying predicate offense, the scope of which has been "carefully limited" by this Court (*Miller* v. *California*, 413 U.S. at 24).

Both this Court and the Indiana Supreme Court have held that the predicate offenses that are used to establish a "pattern of racketeering" in a RICO prosecution need not have been the subject of prior convictions. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 488 (1985); *4447 Corp.* v. *Goldsmith*, 504 N.E.2d at 566. The Constitution requires no different rule when the predicate acts are obscenity crimes. The strict definition of obscenity and the scienter requirements applicable to all obscenity prosecutions will ensure that dealers have ample notice that their conduct may result in a RICO prosecution. Nor is a pretrial judicial determination as to the obscenity of the materials at issue constitutionally required. The obscenity of particular materials, like any other question of fact in a criminal trial, is for the jury to decide. In the absence of a pretrial seizure of, or other restraints placed on, allegedly obscene materials, there is no constitutional requirement of a pretrial adversarial hearing to establish the obscenity of the materials charged in the predicate acts.

ARGUMENT

THE INDIANA RICO STATUTE MAY CONSTITUTIONALLY INCORPORATE STATE OBSCENITY CRIMES AS PREDICATE ACTS

1. Petitioners contend (Br. 24) that "[b]y using obscenity or obscenity related offenses as predicates, the Indiana RICO law becomes impermissibly vague and overbroad." The real target of petitioners' attack, however, is not the Indiana RICO statute, but the Indiana obscenity statute that is incorporated by reference into the Indiana RICO statute. Petitioners claim (Br. 24-25) that "the legal test of obscenity" established by this Court in *Miller* v. *California, supra*, a test carefully tracked by the Indiana obscenity statute (see Ind. Code § 35-49-2-1), "is notably inexact" and, indeed, "so amorphous that the line between communications which are protected and those which are not is often too blurred to identify criminal conduct."

The short answer to petitioners' contention is that neither the correctness of this Court's decision in *Miller* nor the constitutionality of Indiana's obscenity statute is at issue in this case. Those questions were not " 'pressed or passed upon' below." *Clark* v. *Jeter*, No. 87-5565 (June 6, 1988), slip op. 3 (quoting *Bankers Life & Casualty Co.* v. *Crenshaw*, No. 85-1765 (May 16, 1988), slip op. 7).[5] Nor were they presented in the petition for a writ of certiorari to this Court, and the interlocutory posture of this case would make their resolution premature in any event. Thus, even if there is a "need for reexamination of *Miller*"

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[5] Petitioners did not move to dismiss the individual counts charging them with distributing obscene matter. They moved to dismiss only the two RICO counts, and they moved to dismiss those counts based only on alleged vagueness in the RICO statute itself, not based on any alleged vagueness in the underlying Indiana obscenity statute. See J.A. 150-151, 161-167.

(*Pope* v. *Illinois*, No. 85-1973 (May 4, 1987), slip op. 2 (Scalia, J., concurring)), this case is not an appropriate vehicle for that reconsideration.

The question on which this Court granted certiorari is whether the Indiana RICO statute creates any special constitutional problems insofar as it incorporates obscenity as a predicate offense. Petitioners provide no reason to believe that it does. This Court has long recognized that obscenity is not protected under the First Amendment. *Roth* v. *United States*, 354 U.S. at 485. For that reason, the distribution of obscene material is properly subject to criminal penalties through such enforcement tools as the State sees fit to employ. As long as the predicate obscenity statute defines the proscribed material with sufficient precision, incorporation of that statute in another criminal statute raises no additional constitutional concerns.

In *Miller* v. *California*, 413 U.S. at 23, this Court "acknowledge[d] * * * the inherent dangers of undertaking to regulate any form of expression." But the Court dealt with those dangers by "carefully limit[ing]" the scope of state statutes designed to regulate obscene materials (*id.* at 23-24). The Court developed a narrow test for obscenity, formulating "concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment" (*id.* at 29).[6] The Court concluded that "these

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[6] The Court in *Miller* adopted a three-part definition of obscenity (413 U.S. at 24): (1) the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest; (2) the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law; and (3) the work taken as a whole lacks serious literary, artistic, political, or scientific value. See also *Pope* v. *Illinois*, No. 85-1975 (May 4, 1987), slip op. 2-3.

specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution" (*id.* at 27). " 'That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.' " *Roth*, 354 U.S. at 491-492 (quoting *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947)).

The Indiana obscenity statute does not become vague or overbroad by being incorporated as a predicate act under the Indiana RICO statute. As with other predicate crimes, the Indiana RICO statute fully incorporates the state obscenity law. Ind. Code § 35-45-6-1. Thus, to prosecute successfully a violation of the Indiana RICO statute, the government must prove beyond a reasonable doubt each essential element of the state obscenity law. *4447 Corp.* v. *Goldsmith*, 504 N.E.2d at 566; cf. *United States* v. *Turkette*, 452 U.S. 576, 583 (1981); *United States* v. *Levasseur*, No. 88-1198 (1st Cir. May 9, 1988), slip op. 21. If the underlying obscenity statute passes constitutional muster, so does the Indiana RICO statute that incorporates it by reference.[7]

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[7] Petitioners mischaracterize (Br. 28-29 (emphasis in original)) the Indiana RICO statute when they assert that a RICO violation occurs whenever anyone "[k]nowingly *or* intentionally receives proceeds, directly *or indirectly* from a violation of 35-49-3 (obscenity) and who buys real estate or owns or operates a business." The actual language of the Indiana RICO statute clearly requires proof of a pattern of racketeering evidenced by the commission of at least two predicate acts. Ind. Code § 35-45-6-1. No one can be convicted of a violation of the Indiana RICO statute based on the distribution of obscene materials without also being guilty of at least two counts of distribution of obscene materials in violation of Section 35-49-3. *4447 Corp.* v. *Goldsmith*, 504 N.E.2d at 566. Thus, petitioners' speculation (Br. 32) that the telephone company or the water company could be

The Indiana RICO statute cannot reach any conduct that is not also constitutionally reached by the underlying obscenity statute. Indeed, the RICO statute has a narrower scope because, in addition to the underlying obscenity violations, the government must also prove that the predicate acts formed a "pattern of racketeering," that petitioners were "employed by or associated with an enterprise," and that petitioners "knowingly or intentionally conduct[ed] or otherwise participate[d] in the activities of that enterprise through a pattern of racketeering activity." Ind. Code § 35-45-6-2. Federal courts have consistently held that federal RICO provisions similar to those in the Indiana RICO statute are not overly vague. See, *e.g.*, *United States* v. *Tripp*, 782 F.2d 38, 42 (6th Cir.) (listing cases), cert. denied, 475 U.S. 1128 (1986); *United States* v. *Morelli*, 643 F.2d 402, 412 (6th Cir.) (listing cases), cert. denied, 453 U.S. 912 (1981). Petitioners offer no arguments to the contrary. Nor do petitioners explain how such additional elements of proof can render the Indiana RICO statute overly broad as applied to obscenity

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convicted of a RICO violation for providing services to an adult bookstore is wholly unfounded. The "potential reach" (Pet. Br. 28) of the Indiana RICO statute cannot extend beyond the reach of the underlying predicate offenses.

Petitioners contend (Br. 30-33) that the Indiana Supreme Court has diluted the scienter requirement and thus has unconstitutionally expanded the reach of the state obscenity statute beyond the confines set by this Court in *Miller* v. *California*. That issue, however, is not presented in the interlocutory posture of this case. We take no position on the validity of Indiana's obscenity laws or any alleged judicial "gloss" (Pet. Br. 25) placed on those laws by the Indiana Supreme Court. If the scope of Indiana's obscenity laws is overbroad, they may be struck down or limited in an appropriate case. But that question has no bearing on the more general question whether a RICO statute may incorporate a properly defined obscenity crime as a predicate act.

predicates. As long as the underlying state statute defines obscenity according to the test in *Miller*, no First Amendment interests are affected, and the obscenity statute should be treated no differently from other predicate criminal offenses that are incorporated in the Indiana RICO statute.[8]

2. Petitioners contend (Br. 12) that the "draconian sanctions" of the Indiana RICO statute will have a chilling effect on protected speech, in violation of the First Amendment. This argument was not raised by petitioners in their motion to dismiss (see J.A. 150-151),[9] and it was not passed on by either of the courts below. Nor was it listed in the questions presented to this Court for review (see Pet. i). Accordingly, this Court would not ordinarily reach the question. See, *e.g.*, *Clark* v. *Jeter*, slip op. 3; *Bankers Life & Casualty Co.* v. *Crenshaw*, slip op. 5-8. In any event, the argument is without merit.

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[8] An overbreadth challenge only can succeed if the statute in question "make[s] unlawful a substantial amount of constitutionally protected conduct" (*City of Houston* v. *Hill*, No. 86-243 (June 15, 1987), slip op. 7). As long as the definition of obscenity in the underlying statute is not overly broad, the RICO statute that incorporates that definition does not reach constitutionally protected conduct. Under such circumstances, a facial challenge to the RICO statute is inappropriate. As this Court noted in *Miller* v. *California*, 413 U.S. at 25: "If a state law that regulates obscene material is [limited according to the *Miller* standards] * * *, the First Amendment values applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."

[9] In their memorandum of law in support of their motion to dismiss (J.A. 151-167), petitioners did complain (J.A. 156) of the "chilling effect" of the Indiana RICO statute as applied to obscenity offenses. That argument, however, was made only in the context of their contention that the statute was unconstitutionally vague. Petitioners did not challenge or even mention the penalties provided for a violation of the law.

States are free to enact obscenity laws and to impose a variety of criminal penalties and other remedies for violations of those laws. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57 (1973); *Roth* v. *United States*, 354 U.S. at 485-487; *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441 (1957). As this Court has explained, if a state "chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to deal with such books as deodands of old, or both, * * * it is not for [the Court] to gainsay [a state's] selection of remedies." *Kingsley Books, Inc.* v. *Brown*, 354 U.S. at 441. There is no constitutional principle—based on the First Amendment or otherwise—that prohibits a state legislature from providing enhanced penalties for repeated violations of an obscenity law or for violations that are part of a pattern of racketeering. The stiffer penalties affect only the level of the crime and not the type of expression proscribed.[10]

We do not suggest that no chilling will occur as a result of the punishment provisions of the Indiana RICO statute. But unlike the chill that results from restraints on protected speech, see, *e.g.*, *NAACP* v. *Alabama*, 377 U.S. 288, 307-308 (1964); *Thornhill* v. *Alabama*, 310 U.S. 88,

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[10] Unlike the Indiana RICO statute, the federal RICO statute does not prescribe any minimum penalty. One who violates the federal RICO statute "shall be fined not more than $25,000 or imprisoned not more than twenty years." 18 U.S.C. (& Supp. IV) 1963. The maximum fine level has recently been increased to not more than $250,000 for an individual and not more than $500,000 for an organization. 18 U.S.C. (Supp. IV) 3571(b)(1)(A) and (2)(A). Also, while the Indiana RICO statute permits misdemeanor obscenity statutes to define predicate crimes, the federal RICO statute incorporates only felony obscenity statutes as predicate acts. 18 U.S.C. (& Supp. IV) 1961(1). Neither feature of the Indiana RICO statute, however, poses any constitutional difficulty. "It is not for this Court * * * to limit the State in resorting to various weapons in the armory of the law." *Kingsley Books, Inc.* v. *Brown*, 354 U.S. at 441.

98 (1940), the chill that arises from a predicate obscenity statute is a wholly legitimate consequence of the criminal penalties. Deterrence through the threat of prosecution and punishment for constitutionally unprotected activities is a proper goal of the state legislature. As a district court recently noted in the course of rejecting a similar attack on the federal RICO statute:

> Deterrence (or chilling) through the threat of prosecution and punishment is a legitimate goal of the criminal law. Once it is decided that obscenity does not merit First Amendment protection and indeed, once it is decided that obscenity is so pernicious that it should be criminally proscribed, then a subsequent punishment, like RICO's forfeiture scheme, is a sensible and wholly legitimate law enforcement weapon. It is specially designed to chill or deter proscribed, unprotected speech; unconstitutional chilling occurs only if the definition of obscenity is excessively broad or vague so that some protected speech is unintentionally ensnared in the imprecise net that is cast.

United States v. *Pryba,* 674 F. Supp. 1504, 1512-1513 (E.D. Va. 1987) (footnote omitted).

It is true, as petitioners contend (Br. 18), that a cautious bookseller might engage in self-censorship in light of the increased penalties and remove from his shelves some materials that are protected under the First Amendment. "Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene." *Smith* v. *California,* 361 U.S. 147, 154-155 (1959). But this Court has tolerated some degree of voluntary self-censorship as a consequence of state efforts to control hard-core pornography. The Court has sought to limit such voluntary

censorship by strictly defining obscenity and by ensuring that every obscenity statute requires proof that the defendant knew of the contents, character, and nature of the materials. *Hamling* v. *United States,* 418 U.S. 87, 123 (1974); *Mishkin* v. *New York,* 383 U.S. 502, 511 (1966). Provided that a state obscenity statute meets these requirements, the state may fairly impose significant penalties for materials found to be obscene. See, *e.g.*, *Roth* v. *United States,* 354 U.S. at 479 n.1 (upholding federal obscenity law with penalties of up to five years' imprisonment and a $5,000 fine); *Ginzburg* v. *United States,* 383 U.S. 463, 464 n.2 (1966) (same).[11]

In addition to the "harsh prison sentences" provided by the Indiana RICO statute, petitioners attack (Br. 17) the "pre- and post-indictment seizure of assets [and] post-conviction forfeiture" contemplated by "[t]he challenged statute." Petitioners, however, have been charged only with a criminal RICO violation. No civil forfeiture proceedings have been brought against them and none of their assets have been seized or otherwise restrained. The civil forfeiture proceedings at issue in *Fort Wayne Books, Inc.* v. *Indiana, supra,* have no bearing on the constitutionality

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[11] In *New York* v. *Ferber,* 458 U.S. 747, 773 (1982), this Court noted that "the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial." The Court emphasized (*ibid.*), however, that "the fact that a criminal prohibition is involved does not * * * *a priori* warrant a finding of substantial overbreadth." If an obscenity statute is properly defined, its "legitimate reach dwarfs its arguably impermissible applications" (*ibid.*), and the alleged severity of the criminal sanctions does not render it overbroad. "To be sure, RICO's sanctions are severe, but severity alone does not cause unconstitutional chilling or convert these sanctions into prior restraints." *United States* v. *Pryba,* 674 F. Supp. at 1518 (footnote omitted).

of the criminal penalites (fine and imprisonment) that are imposed by the Indiana RICO statute.[12]

3. Petitioners contend (Br. 33-37) that, even if the Indiana RICO statute's incorporation of obscenity crimes as predicate acts is not unconstitutional on its face, certain "specific safeguards" must be read into the statute "to ensure that the requisite sensitivity exists to render the statute constitutional" (Br. 33). Petitioners argue (Br. 34), first, that the predicate obscenity offenses must "be in the form of prior, properly obtained convictions where the second offense occurs after the first conviction and where a third 'RICO triggering act' occurs after the second conviction." Petitioners further claim (Br. 36) that they have a right to a "prompt judicial determination of probable obscenity in an adversary proceeding." Neither claim has merit.

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[12] Among the penalties for a criminal conviction, the federal RICO statute provides for the forfeiture of assets used in or derived from a violation of the Act. 18 U.S.C. (& Supp. IV) 1963(a). Prior to trial, the United States may seek "a restraining order or injunction, * * * the execution of a performance bond, or * * * any other action to preserve the availability of [the] property" in question. 18 U.S.C. (Supp. IV) 1963(d). As a policy matter, however, the United States does not seek to seize or otherwise restrain books, films, or other bookstore assets prior to conviction in a federal RICO case involving predicate obscenity statutes. See, *e.g.*, *United States* v. *Pryba*, 674 F. Supp. at 1508 n.16. Since *Fort Wayne Books, Inc.* v. *Indiana*, *supra*, involves only the propriety of a pretrial seizure of assets and since the instant case does not involve any seizure of assets whatsoever, we do not understand either case to raise a question concerning the constitutionality of a post-conviction forfeiture of assets used in or derived from the sale of obscene materials.

a. The Indiana Supreme Court has already concluded that prior convictions for predicate obscenity offenses are not statutorily required to prove a pattern of racketeering activity under Indiana law. *4447 Corp.* v. *Goldsmith,* 504 N.E.2d at 566. Nor does the Constitution impose such a requirement. This Court has held that prior convictions are not required in a civil case brought under the federal RICO statute, *Sedima, S.P.R.L.* v. *Imrex Co.,* 473 U.S. at 488. In the course of its discussion, the Court dismissed as "nonsens[e]" the implication of the contrary position that "a prior conviction would also be a prerequisite * * * for a criminal prosecution" (*ibid.*).

No special rules are mandated when obscenity crimes are the predicate acts. This Court has never required a State to fire warning shots, in the form of misdemeanor prosecutions, before it may bring felony charges for distributing obscene materials. The strict scienter requirements applicable to obscenity prosecutions, see *Hamling* v. *United States, supra,* will ensure that the dealer has actual knowledge of the contents, character, and nature of the materials in question. And the "specific prerequisites" for hard-core pornography that are outlined in *Miller* v. *California,* 413 U.S. at 27, "will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

b. Indiana law requires that within ten days after allegedly obscene material is seized or purchased or a defendant is arrested for obscenity violations, "the defendant, an owner, or any other party in interest of any matter seized or purchased may apply for and obtain a prompt adversary hearing * * * [at which] the court shall make a preliminary determination of whether the matter is * * * [p]robably obscene [or] [p]robably harmful to minors." Ind. Code § 35-49-2-4. The record indicates, however,

that petitioners never applied for such a hearing. See J.A. 135-137 (docket entries). They cannot, therefore, be heard now to complain that they did not receive the hearing they never sought.

Furthermore, such a pretrial judicial determination as to the obscenity of the materials at issue is not constitutionally required. Obscenity, like any other essential question of fact in a criminal trial, is for the jury to decide. *Pope* v. *Illinois*, slip op. 2-3; *Smith* v. *United States*, 431 U.S. 291, 300-308 (1977). No pretrial screenings are necessary in ordinary obscenity prosecutions, and there is no reason why the rule should be different simply because the obscenity violation appears as a predicate act in another statute.[13]

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[13] A prompt adversarial determination of obscenity may well be required where allegedly obscene materials are seized or otherwise restrained prior to trial. See *Heller* v. *New York*, 413 U.S. 483, 488-493 (1973). But in contrast to *Fort Wayne Books, Inc.* v. *Indiana*, *supra*, no materials have been seized in this case, and no distribution of materials or other bookstore activities have been restricted. The mere purchase of materials from the bookstore for use as evidence in a subsequent prosecution cannot, in any sense, be considered a "seizure" of those materials. See *Maryland* v. *Macon*, 472 U.S. 463, 469-470 (1985).

CONCLUSION

The judgment of the Court of Appeals of Indiana should be affirmed.

Respectfully submitted.

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